965 C (10)

Supreme Court, U.S.
FILED
DEC 15 2006
CLERK

No. 05-983

IN THE

Supreme Court of the United States

JACOB WINKELMAN, *et al.*,
Petitioners,

v.

PARMA CITY SCHOOL DISTRICT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AUTISM SOCIETY OF AMERICA, NORTHERN VIRGINIA CHAPTER, COALITION OF TEXANS WITH DISABILITIES, DISABILITY LAW & ADVOCACY CENTER OF TENNESSEE, KENTUCKY PROTECTION AND ADVOCACY, MICHIGAN PROTECTION AND ADVOCACY SERVICE, INC., NATIONAL DISABILITY RIGHTS NETWORK, PARENTADVOCATES.ORG, PARENTS FOR AUTISTIC CHILDREN'S EDUCATION, AND JEFF AND SHARON PODOWITZ, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ILISE L. FEITSHANS
120 Warwick Rd
Haddonfield, NJ 08033
(856) 428-0605

BARBARA E. ETKIND *
PRASHANT K. KHETAN
KIMBERLY A. ASHMORE
ROSS, DIXON & BELL, LLP
2001 K Street, N.W.
Washington, D.C. 20006
(202) 662-2000

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICI CURIAE*	1
ARGUMENT	3
I. THE DECISION OF THE SIXTH CIRCUIT SHOULD BE REVERSED BECAUSE IT PRODUCES RESULTS INCONSISTENT WITH CONGRESS'S INTENT IN ENACTING THE IDEA	3
A. Statutes Should Be Construed to Effectuate Congressional Intent	4
B. Affirmance of the Sixth Circuit's Decision Would Produce Results So Inconsistent with Congress's Intent in Enacting the IDEA as to Be Absurd	5
1. The Vast Majority of Parents with Rights Under the IDEA Have No Alternative but to Proceed Pro Se	6
a) Although Advocacy Organizations Exist to Provide Legal Assistance to Parents, They Have Extremely Limited Resources	6
b) Nor Can Private Attorneys Fill the Void	8
c) The Attorneys' Fees Provision in the IDEA Has Not Been Interpreted in a Manner that Addresses this Issue	11
2. At All Other Levels of IDEA Enforcement, Parents May Proceed Without Attorneys	13

TABLE OF CONTENTS—Continued

Page

3. School Districts will be Guaranteed Success Simply by Forcing Lawsuits into Federal Court 13

CONCLUSION 15

TABLE OF AUTHORITIES

CASES Page

Board of Education v. Rowley, 458 U.S. 176 (1982) 4
Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691 (2003) 13
Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources, 532 U.S. 598 (2001) 11
Cedar Rapids Community Sch. District v. Garret F., 526 U.S. 66 (1999) 4
Chapman v. United States, 500 U.S. 453 (1991)... 4, 5
Clinton v. City of New York, 524 U.S. 417 (1998).. 4
Collinsgru v. Palmyra Board of Education, 161 F.3d 225 (3d Cir. 1998) 8, 9, 11
Dodd v. United States, 545 U.S. 353 (2005) 5
Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982) 5
Haggar Co. v. Helvering, 308 U.S. 389 (1940)..... 5
J.C. v. Reg'l Sch. District 10, 278 F.3d 119 (2d Cir. 2002) 12
John T. ex rel. Paul T. v. Del. County Intermediate Unit, 318 F.3d 545 (3d Cir. 2003) . 11, 12
Maroni v. Pemi-Baker Reg'l Sch. District, 346 F.3d 247 (1st Cir. 2003) 13, 14
Scheidler v. National Organization for Women, Inc., __ U.S. __, 126 S. Ct. 1264 (2006) 4
T.D. v. LaGrange Sch. District No. 102, 349 F.3d 469 (7th Cir. 2003) 12
United States v. Ryan, 284 U.S. 167 (1931)..... 5

STATUTES, REGULATIONS AND LEGISLATIVE HISTORY

20 U.S.C. § 1400 ..... *passim*
20 U.S.C. § 1415 ..... 11, 12, 13

TABLE OF AUTHORITIES—Continued

Page

150 Cong. Rec. S5250-02 (2004) 10
34 C.F.R. Pt. 300 13
N.H. Rev. Stat. Ann. § 311:1 (2006) 14

MISCELLANEOUS

M. Brendhan Flynn, *Note, In Defense of Maroni: Why Parents Should be Allowed to Proceed Pro Se in IDEA Cases*, 80 Ind. L.J. 881 (2005) .. 5

Mary Wagner, *et al., The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities And Their Households* (Sept. 2002), *available at* http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf (last visited Dec. 7, 2006) 10

Mary Wagner, *et al., The Individual and Household Characteristics of Youth With Disabilities: A Report from the National Longitudinal Transition Study-2 (NLTS-2)* (Aug. 2003), *available at* http://www.nlts2.org/reports/2003_08/nlts2_report_2003_08_execsum.pdf (last visited Dec. 7, 2006) 10

NDRN, *Repairing the Unraveling Safety Net: 2005 Annual Report, available at* http://www.ndrn.org/pub/annrpt/2005/2005FYrpt.pdf (last visited Dec. 7, 2006) 4

NDRN, *The Protection and Advocacy for Developmental Disabilities Program: Report of 2005 Activities* (2005), *available at* http://www.ndrn.org/pub/annrpt/2005/PADD.pdf (last visited Dec. 7, 2006) 6

TABLE OF AUTHORITIES—Continued

Page

National Council on Disability, *National Disability Policy: A Progress Report, December 2003-December 2004* (November 2005), *available at* http://www.ncd.gov/newsroom/publications/2005 /progress_report.htm (last visited Dec. 7, 2006) 12

National Dissemination Center for Children with Disabilities, *Who Are the Children in Special Education?* (July 2003), *available at* http://www.nichcy.org/pubs/research/rb2.pdf (last visited Dec. 7, 2006) 10

INTEREST OF THE *AMICI CURIAE* [1]

Autism Society of America, Northern Virginia Chapter (ASA-NV), is a non-profit organization that provides support, in the areas of education, vocational training and recreation, to families of individuals with autism. ASA-NV aids families through the collection and dissemination of information to parents, professionals and the general public, and fosters and reinforces awareness and respect for the rights of parents as the primary case managers in the lives of an autistic family member.

Coalition of Texans with Disabilities is a public interest organization, founded in 1978 by people with disabilities, that provides advocacy services to people of all disabilities and ages.

Disability Law & Advocacy Center of Tennessee (DLAC) is a federally funded and authorized Protection and Advocacy (P&A) organization that has provided advocacy services to people with disabilities in Tennessee since 1978. DLAC advocates for the educational rights of students and their parents under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* (IDEA), through legal representation and training for individuals and groups and by providing support in the development of individualized education programs (IEPs). DLAC also serves as a resource for private attorneys, government officials and school personnel.

Kentucky Protection and Advocacy (KPA) is an independent state agency that is the federally mandated P&A organization in Kentucky. KPA provides advocacy services

---

[1] Pursuant to Sup. Ct. R. 37.6, *amici* state that no counsel to a party authored this brief in whole or in part and that no person other than the *amici curiae* and their members made a financial contribution towards the preparation and submission of the brief. Letters reflecting the consent of the parties have been lodged with the Clerk.

to promote and protect the rights of individuals with disabilities, including the rights of parents to have their children receive, and of children to receive, a free appropriate public education (FAPE) under the IDEA.

Michigan Protection and Advocacy Service, Inc. (MPAS) is a federally funded and authorized P&A organization that has provided advocacy services to people with disabilities in Michigan since 1981. MPAS provides information and referral services to people who need information or assistance on IDEA issues, and provides direct representation in selected cases involving students with disabilities receiving special education services and support under the IDEA.

National Disability Rights Network (NDRN) is the membership association of P&A agencies that are located in all 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa and the Northern Marianas Islands and includes a Native American Program. P&As are authorized under various federal statutes to provide legal representation and related advocacy services on behalf of persons with all types of disabilities in a variety of settings. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities.

Parentadvocates.org is the d/b/a of the E-Accountability Foundation, a Section 501(c)(3) non-profit organization dedicated to informing parents and children of their legal rights and assisting in the processes required to obtain an appropriate educational program for every child.

Parents for Autistic Children's Education (PACE) is a not-for-profit membership organization that serves parents and guardians of children with autism or similar disorders in the Northern Virginia area. PACE advocates on behalf of children with autism and their families for high-quality,

effective and scientifically based educational programs and to ensure school-system compliance with the IDEA.

Jeff and Sharon Podowitz seek, for themselves and their son, the right to participate in special education litigation without counsel.

Amici regularly represent and advocate for the interests of children and parents in their ongoing pursuit of free appropriate public education for the disabled and thus have a significant interest in the Court's decision in this case. As one of the primary resources available to families of children with disabilities, *amici* write to offer a unique perspective on the reasons why parents must be permitted to proceed in court *pro se* to assert rights under the IDEA. *Amici* concur with the arguments made by petitioners and the other *amici* supporting them. In accordance with Sup. Ct. R. 37.1, *amici* will not repeat those arguments here. Rather, *amici* submit this brief to bring to the Court's attention certain statistics that demonstrate why an affirmance of the Sixth Circuit's decision would bring about results wholly inconsistent with Congress's intent in passing the IDEA.

ARGUMENT

I. THE DECISION OF THE SIXTH CIRCUIT SHOULD BE REVERSED BECAUSE IT PRODUCES RESULTS INCONSISTENT WITH CONGRESS'S INTENT IN ENACTING THE IDEA.

Education remains the key to becoming a productive member of society. With particular respect to the education of individuals with disabilities,

> [t]he past 30 years have seen a vast improvement in the area of education, including the very recognition that individuals with disabilities should be educated; the identification of best practices in the education of

> individuals with a wide range of disabilities; and the inclusion of such individuals in regular classroom settings. Unfortunately, we are now seeing the unraveling of this essential safety net, as well.

NDRN, *Repairing the Unraveling Safety Net: 2005 Annual Report*, at 12 (2005), *available at* http://www.ndrn.org/pub/annrpt/2005/2005FYrpt.pdf (last visited Dec. 7, 2006). The Sixth Circuit's ruling renders that net so permeable as to permit the majority of children with disabilities to fall through it.

A. Statutes Should Be Construed to Effectuate Congressional Intent.

The goal of interpreting any federal statute is to effectuate congressional intent. *See Scheidler v. Nat'l Org. for Women, Inc.*, __ U.S. __, 126 S. Ct. 1264, 1273-74 (2006) (noting that canons of statutory construction "are tools designed to help courts better determine what Congress intended, not to lead courts to interpret the law contrary to that intent"). Indeed, with particular respect to the IDEA, this Court has sought to conform its interpretations of provisions of the statute to Congress's intent in enacting it. *See, e.g., Bd. of Educ. v. Rowley*, 458 U.S. 176, 189-204 (1982) (examining congressional intent to interpret the requirement of a FAPE); *Cedar Rapids Cmty. Sch. Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. 66, 77-78 (1999) (same in construing the term "related services" under the IDEA).

The IDEA thus must be construed in a manner that yields results that are consistent with Congress's intent in enacting the statute. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 429 (1998) ("Acceptance of the Government's newfound reading of [the statute] would produce an absurd and unjust result which Congress could not have intended[.]") (internal quotations and citation omitted); *Chapman v.*

United States, 500 U.S. 453, 476 & n.13 (1991) (Stevens, J., dissenting) (citing cases for the proposition that the Court does not interpret a statute in a manner that reaches an absurd result "on the ground that Congress could not have intended such an outcome"); *Dodd v. United States*, 545 U.S. 353, 368-69 (2005) (Stevens, J., dissenting) ("It is this absurd result that convinces me that Congress could not have intended that [the statute] should be read in this manner."); *see also Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982); *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940); *United States v. Ryan*, 284 U.S. 167, 175 (1931). As set forth below, the Sixth Circuit's ruling must be reversed because that court's interpretation of the IDEA—that parents cannot proceed in court *pro se* – would produce results that are so inconsistent with Congress's intent in enacting the IDEA as to be absurd.

B. Affirmance of the Sixth Circuit's Decision Would Produce Results So Inconsistent with Congress's Intent in Enacting the IDEA as to Be Absurd.

> The importance of having a vigorous system of judicial review is apparent since states are lax in enforcing school compliance with the IDEA, some schools traditionally override parents' concerns about their child's IEP, and because due process hearings are skewed against poor children.

M. Brendhan Flynn, *Note, In Defense of Maroni: Why Parents Should be Allowed to Proceed Pro Se in IDEA Cases*, 80 Ind. L.J. 881, 887-88 (2005) (citations omitted). To this end, and to the extent that parents are not permitted to proceed *pro se* under the statute, the rights provided to families under the IDEA will be rendered meaningless because there will be no way to enforce them. This absurd result is in direct conflict with the reasons underlying the

statute, and it cannot possibly be what Congress intended when it enacted the IDEA.

1. *The Vast Majority of Parents with Rights Under the IDEA Have No Alternative but to Proceed Pro Se.*

The statistics are clear that the majority of parents have insufficient resources to enforce rights guaranteed by the IDEA in any meaningful manner other than *pro se*. *See, e.g.*, NDRN, *The Protection and Advocacy for Developmental Disabilities Program: Report of 2005 Activities*, at 4 (2005), *available at* http://www.ndrn.org/pub/annrpt/2005/PADD.pdf (last visited Dec. 7, 2006) ("Parents of children with developmental disabilities have few resources to help them understand and negotiate the special education process."); *see also infra* note 3. Permitting the court of appeals' decision to stand thus would render illusory the rights guaranteed to families under the IDEA.

a) Although Advocacy Organizations Exist to Provide Legal Assistance to Parents, They Have Extremely Limited Resources.

Respondent asserted that public interest legal services are available to assist parents in pursuing their rights. (Brief in Opposition to the Petition for Writ of Certiorari (Opp.) at 17-18.) *Amici*, as the primary source of legal services available to parents, have a unique (and very different) perspective on this issue, however. The facts below (obtained from NDRN, the membership association of state P&As, which, in turn, obtained the information directly from the P&As[2]) demonstrate that these organizations have

[2] An affidavit in support of this data is on file with counsel of record.

insufficient resources to satisfy the overwhelming need for their services:

- Alabama Disabilities Advocacy Program received 905 special education requests in fiscal year 2005. Its staff of one full-time attorney was able to provide case advocacy services in response to only thirteen percent of those requests.
- Ohio Legal Rights Service received 595 requests in fiscal year 2006 and provided substantive assistance in less than three percent of those requests. The organization has four attorneys and two advocates who handle special education cases, none of whom works on the cases full-time.
- In fiscal year 2005, Arizona Center for Disability Law was able to assist with only fourteen percent of the 1,627 requests that it received that year. The organization currently has one full-time and three part-time employees assisting with special education matters.
- Legal Center for People with Disabilities and Older People in Colorado received 1,419 requests from 2004 through November 2006, and its staff of two special education attorneys was able to handle less than seventeen percent of those cases.
- MPAS received 10,399 requests between October 1, 1999 and January 31, 2006, and was able to provide representation in only seventeen percent of those cases. Its staff consists of four attorneys, none of whom handles special education cases full-time, and two of whom focus primarily on other areas of practice.
- KPA received 515 requests from October 2005 through September 2006 and its staff of two full-time and one part-time attorneys (none of whom work exclusively on special education cases; the part-time attorney provides information and referral

assistance only) assisted with less than twenty percent of those cases.

- Between January 2003 and November 2006, Disability Law Center of Alaska received 1,125 requests for services and had to reject seventy-seven percent of them. The organization has two part-time special education attorneys.
- Disability Rights Wisconsin receives approximately 175 requests for assistance each year. The organization's staff of only two special education attorneys (one of whom is part-time), together with private attorneys to whom it refers cases, is able to assist with less than one-quarter of the requests for legal assistance that it receives each year.
- Maine's Disability Rights Center has one special education attorney and three non-attorney advocates on staff who were unable to assist with more than sixty percent of the 387 requests that were received during fiscal year 2006.
- In the past year, Massachusetts Disability Law Center received approximately 570 requests and was able to assist with less than half of them.

b) Nor Can Private Attorneys Fill the Void.

Respondent also asserted that there exist low-cost and court-appointed counsel available to assert the rights guaranteed under the IDEA. (Opp. at 18.) This contention is without merit for several reasons. First, there is an insufficient number of qualified attorneys to represent parents in IDEA cases. "[M]ost attorneys will be reluctant to take on cases * * * characterized * * * by voluminous administrative records, long administrative hearings, and specialized legal issues, without a significant retainer." *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 236 (3d

Cir. 1998). The statistics (also obtained from NDRN) bear this out:

- There is one private attorney for the entire state of Alaska who assists with special education cases.
- In Wisconsin, there is one full-time private attorney who represents parents and children in special education cases, and five who handle the cases as a significant part of their practice. Together, the six private attorneys accept approximately *five referrals each year* from Disability Rights Wisconsin.
- MPAS has three attorneys on its official referral list, and is aware of eight other private attorneys who handle special education cases. More than half of these attorneys are located in one county, and seventy-eight of Michigan's eighty-three counties have no private special education attorneys.
- Arizona Center for Disability Law is aware of only two private attorneys who accept referrals for special education matters.
- KPA has four private attorneys on its referral list, but none accepts cases in western Kentucky. No private attorney accepted referrals from KPA from October 2005 through September 2006.
- North Dakota P&A Project is aware of two private attorneys that have worked on special education cases in the past. Last year, however, only one case was handled by a private attorney, and that was with the assistance of the organization.
- There are only five private attorneys in Alabama who handle special education cases.
- Legal Center for People with Disabilities and Older People in Colorado is aware of four private attorneys who handle special education cases. The private attorneys accept very few referrals from the organization.

- There are approximately six private special education attorneys in the entire state of Maine.

Even if there were a sufficient number of attorneys willing to take these cases, to the extent such counsel are private and not court-appointed (as most are), parents of children with disabilities simply are unable to afford them. *See* Mary Wagner, *et al.*, *The Individual and Household Characteristics of Youth With Disabilities: A Report from the National Longitudinal Transition Study-2 (NLTS-2)* at 2 (Aug. 2003), *available at* http://www.nlts2.org/reports/2003_08/nlts2_report_2003_08_execsum.pdf (last visited Dec. 7, 2006) (noting that almost twice as many children with disabilities as children in the overall general population live in households whose head is not employed); *see also* 150 Cong. Rec. S5250-02, S5351 (daily ed. May 12, 2004) (statement of Sen. Kennedy) ("Most parents don't have access to an attorney, or must rely on low-cost legal aid. And data from surveys shows that even this help is in short supply."). Indeed, because parents of children with disabilities often live below the poverty line, payment of a retainer is not an option available to many parents. Mary Wagner, *et al.*, *The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities And Their Households* at 28 (Sept. 2002), *available at* http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf (last visited Dec. 7, 2006); National Dissemination Center for Children with Disabilities, *Who Are the Children in Special Education?* at 6 (July 2003), *available at* http://www.nichcy.org/pubs/research/rb2.pdf (last visited Dec. 7, 2006).[3]

---

[3] For further briefing on the disproportionate economic level of families of children with disabilities, *amici* refer the Court to Section II.A. of the brief submitted by *amici* Council of Parent Attorneys and Advocates, Inc., et al.

c) The Attorneys' Fees Provision in the IDEA Has Not Been Interpreted in a Manner that Addresses this Issue.

Congress, perhaps cognizant of the above shortfalls in attorney availability for IDEA cases, *see Collinsgru*, 161 F.3d at 236, included within the statute an attorneys' fees provision that awards fees "to a *prevailing party* who is the parent of a child with a disability." 20 U.S.C. § 1415(i)(3)(B)(i)(I) (emphasis added). However, courts have interpreted the attorneys' fees provision in a manner that provides little incentive for attorneys to assist with these cases. Indeed, according to these rulings, even where a parent is successful in obtaining the requested relief in a particular IDEA case, the parent may not be considered a "prevailing party" within the meaning of the statute such that he or she is entitled to attorneys' fees.

In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), this Court held that where a settlement is reached prior to adjudication on the merits (regardless of the amount of attorneys' fees incurred to that point), the party achieving its desired result may not be considered a "prevailing party." *See id.* at 600. Rather, in order to be a "prevailing party" entitled to attorneys' fees, the party must achieve a judicially sanctioned change in the legal relationship of the parties. *Id.* at 603-05. Although *Buckhannon* was not an IDEA case, the Court noted that Congress authorized the award of attorneys' fees to the "prevailing party" in numerous statutes and that the Court has interpreted the fee-shifting provisions in those statutes consistently. *Id.* at 602-03 & n.4. In fact, subsequent courts have embraced *Buckhannon's* broad language and have applied its holding to deny or limit attorneys' fees in IDEA cases. *See, e.g., John T. ex rel. Paul T. v. Del. County Intermediate Unit*, 318 F.3d 545, 556-61 (3d Cir. 2003) (affirming denial of

attorneys' fees to parents who, after obtaining preliminary injunction, voluntarily dismissed complaint once school district agreed to implement a new IEP); *J.C. v. Reg'l Sch. Dist. 10*, 278 F.3d 119, 123-25 (2d Cir. 2002) (holding that plaintiff was not entitled to attorneys' fees where the school voluntarily provided all requested relief); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 475-80 (7th Cir. 2003) (holding that parents were not entitled to portion of attorneys' fees incurred in seeking judicial review where settlement was reached immediately prior to trial, but upholding fee award to the extent parents succeeded at the administrative hearing).

Concern also has been expressed that other aspects of the attorneys' fees provision may serve as a deterrent to attorneys who otherwise might be willing to handle these cases. Specifically, the IDEA provides that a school district may recover from a parent's attorney the attorneys' fees incurred by the school district in defending against a claim that is "frivolous, unreasonable, or without foundation" or "presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." 20 U.S.C. § 1415(i)(3)(B)(i)(II), (III). The IDEA's attorneys' fees provision thus may provide a *disincentive* for attorneys to represent families pursuing IDEA claims. *See* National Council on Disability, *National Disability Policy: A Progress Report, December 2003 – December 2004* at 63 (November 2005), *available at* http://www.ncd.gov/newsroom/publications/2005 /progress_report.htm (last visited Dec. 7, 2006) (noting that the National Council on Disability is "particularly concerned about how and by whom the notion of a 'frivolous,' 'unreasonable,' or 'without foundation' complaint will be defined" because "[i]t is easy to see how this threat could have a profoundly chilling effect on the assertion of meritorious claims").

2. *At All Other Levels of IDEA Enforcement, Parents May Proceed Without Attorneys.*

The IDEA actually discourages parents from obtaining legal counsel when they meet with school district officials to develop an IEP for their child out of concern that an attorney's presence could create an adversarial relationship between parents and the school district. *See Maroni v. Pemi-Baker Reg'l Sch. Dist.*, 346 F.3d 247, 256 (1st Cir. 2003); *see also* 34 C.F.R. Pt. 300, App. A., question 29 (2006). And if a dispute rises to the level of a due process hearing, Congress permits parents to have counsel accompany and advise them at the administrative due process hearing, but does not require them to do so. *See* 20 U.S.C. § 1415(h)(1). It simply makes no sense to suggest that Congress intended for parents to have a choice regarding the use of counsel at the IEP and due process levels, but meant to require legal representation at the federal court level. *Maroni*, 346 F.3d at 256-57 ("It would be odd for Congress to exclude parents from the definition of 'parties aggrieved' as to substantive claims, and thus force them to find attorney representation at the federal court level, after giving parents such a strong role at every other stage of the process.").

3. *School Districts will be Guaranteed Success Simply by Forcing Lawsuits into Federal Court.*

It is even more illogical to read the statute in a way that effectively renders meaningless an option that Congress wrote into the IDEA—the right to bring suit in state *or* federal court. *See* 20 U.S.C. § 1415(i)(2)(A). Indeed, under the Sixth Circuit's ruling, a *pro se* parent's right to litigate an IDEA action would be thwarted by a school district that is able to have the case heard in federal court. *See Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003). For

example, parents who cannot afford to hire a lawyer or otherwise obtain one may file suit in state court *pro se*, as some states permit. *See, e.g.*, N.H. Rev. Stat. Ann. § 311:1 (2006). The school district could guarantee victory, however, simply by removing the case to federal court, where the parents would not be allowed to proceed *pro se*. Moreover, in cases where *pro se* parents prevailed at the administrative hearing level, school districts could secure reversals simply by filing an appeal in federal court because, without an attorney, a family would be prohibited from appearing in court. Such absurd results plainly were not intended by Congress when it passed the IDEA.

As set forth above, the Sixth Circuit's ruling is inconsistent with Congress's intent in enacting the IDEA in that if left to stand, the ruling will produce absurd results. Indeed, and as the First Circuit held in *Maroni*, "[a] rule prohibiting *pro se* representation would subvert Congress's intent by denying many children with special needs their day in court." 346 F.3d at 257 (footnote omitted). In order to prevent these absurd results, parents must be permitted to proceed *pro se*.

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit should be reversed.

Respectfully Submitted,

ILISE L. FEITSHANS
120 Warwick Rd
Haddonfield, NJ 08033
(856) 428-0605

Counsel for Jeff and Sharon Podowitz

BARBARA E. ETKIND *
PRASHANT K. KHETAN
KIMBERLY A. ASHMORE
ROSS, DIXON & BELL, LLP
2001 K Street, N.W.
Washington, D.C. 20006
(202) 662-2000

Counsel for Autism Society of America, Northern Virginia Chapter, Coalition of Texans with Disabilities, Disability Law & Advocacy Center of Tennessee, Kentucky Protection and Advocacy, Michigan Protection and Advocacy Service, Inc., National Disability Rights Network, Parentadvocates. org, Parents for Autistic Children's Education

* Counsel of Record